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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of
Toll Free Service Access Codes

)

CC Docket No. 95-155

To: Chief, Common Carrier Bureau

PETITION FOR RECONSIDERATION

T. MICHAEL JANKOWSKI
COLLIER, SHANNON, RILL & SCOTT
3050 K Street, N.W.
Suite 400
Washington, D.C. 20007
(202) 342-8400

Counsel to Genesis Two, Inc. and
Stop 888 Coalition

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SUMMARY

Petitioners herein ask the Common Carrier Bureau ("Bureau") to reconsider the *Report and Order*, Mimeo No. DA-96-69, released January 25, 1996 (and published in the *Federal Register* on February 29, 1996 at 61 Fed. Reg. 7738) ("*R&O*"). As commercial subscribers to toll free numbers in the 800 service access code ("SAC"), Petitioners are interested persons in this proceeding. The *R&O* has injured Petitioners in two ways. First, by authorizing the initiation of toll free service using the 888 SAC without first examining the need for this new SAC, the Bureau has caused a diminution of the value of all commercial 800 numbers. Second, by allowing for early reservation of 888 numbers without addressing the problems related to replication of 888 equivalent numbers, the Bureau has caused untold numbers of commercial 800 number subscribers to lose any right to protect the 888 equivalent. The only beneficiaries of 888 deployment will be those who profit from the allocation of additional toll free numbers.

As will be demonstrated herein, as a result of ignoring the deficiencies in the Service Management System/800 Number Administration Committee ("SNAC") plan, the FCC has erroneously concluded that there is a need for toll free SACs in addition to the 800 SAC. In fact, a large volume of 800 numbers have been allocated to individuals that are not using them at all, or are using them sparingly or inefficiently. All of this could have been avoided if the Commission had adopted alternatives to the SNAC plan, explained herein, that would have maximized use of *existing* SACs. Instead, the FCC has been hoodwinked by those interexchange carriers whose representatives comprise the relevant committees into believing that the United States needs additional toll free SACs when it does not. The Commission's failure to properly

supervise the number allocation scheme constitutes an abdication of its responsibility to regulate the activities of those engaged in the provision of common carrier services under Title II of the Communications Act of 1934, as amended.

The petition requests that the Bureau reconsider its decision to allow the implementation of the 888 SAC to go forward. It asks that the Bureau to take the following steps. First, the Bureau must order Database Services Management, Inc. ("DSMI") to immediately halt the dissemination of commercial numbers in the 888 SAC. It also must demand the reclamation of those numbers that are in "working status" (*e.g.*, have been allocated by a Responsible Organization ("RespOrg") for use by a subscriber) and cancel their service.

Finally, if the Bureau refuses to halt implementation of 888, it must instruct DSMI to reclaim those 888 numbers that are presently in working status for which the subscriber to the equivalent 800 number has requested replication. The *R&O* should have ordered DSMI to place all numbers for which replication was requested in the "unavailable" pool regardless of whether others were using or had requested to use them. By failing to do this, the FCC has implicitly excused the misconduct of the RespOrgs in not informing all 800 number subscribers of their capacity to request replication.

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To: Chief, Common Carrier Bureau

PETITION FOR RECONSIDERATION

Pursuant to Section 1.429(a) of the Commission's Rules, 47 C.F.R § 1.429, Genesis Two, Inc. and the Stop 888 Coalition (collectively "Petitioners"), by their attorneys, hereby request that the Common Carrier Bureau ("Bureau") of the Federal Communications Commission ("FCC"), reconsider the *Report and Order*, CC Docket No. 95-155, FCC Mimeo No. DA 96-60, released January 25, 1996 ("*R&O*") in the above-referenced proceeding.^{1/}

I. INTEREST OF PETITIONERS AND STANDING

Petitioner Genesis Two, Inc. ("Genesis") owns and operates a cut flowers and gift delivery business under the name 800-BLOSSOM, serving customers via the telephone on a nationwide and international basis. Petitioner Stop 888 Coalition is a non-profit organization created expressly to protect the rights of commercial subscribers to toll free numbers in the 800 service access code ("SAC") and consumers that utilize toll free service. It is comprised of Genesis and other commercial entities that sell goods or services via toll free numbers.

Petitioners are "interested persons" in this matter, and thus have standing to file this Petition for Reconsideration ("Petition"). It is indisputable that the *R&O* adversely affects

^{1/} Notice of the *R&O* was not provided in the *Federal Register* until February 29, 1996, which, under Section 1.4(b)(1) of the Commission's rules, is the date of "public notice" of the document.

Petitioners' businesses. First, it authorized implementation of the 888 SAC, thereby permitting the creation of a host of new commercial toll free numbers with a different prefix. Second, it allowed for early reservation of numbers in the new 888 SAC before rights of 800 number subscribers in these numbers had been established. Third, it only briefly extended the period during which the administrator of the toll free number database, Database Management Services, Inc. ("DSMI"), could accept requests from Responsible Organizations ("RespOrgs") for protection for the 888 equivalent number of their 800 number commercial subscribers.^{2/}

The *R&O* is nothing short of a disaster for existing commercial subscribers to and users of 800 toll free numbers. Implementation of the 888 SAC will dilute the value of 800 number service that means so much to commercial 800 number subscribers and to the general public. It will confuse consumers unaccustomed to and unprepared for dialing a new toll free SAC. It will irreparably harm thousands of businesses that depend on their 800 number by not only diluting the strength of the brand identity developed in these numbers, but also stifling the goodwill that 800 numbers and their subscribers have established with the public. It only benefits those who seek to profit from the allocation of additional toll free numbers. Worst of all, it is completely unnecessary, because alternative schemes of allocating toll free numbers could have been adopted.

In addition, the *R&O* is flawed because it did not mandate that RespOrgs notify their commercial 800 number customers of their option of requesting "replication" for their 888 equivalent numbers. It only "allowed" RespOrgs additional time to notify, and required that any new replication requests be received by DSMI no later than February 1, 1996. *R&O*, slip op. at

^{2/} As it turned out, allowing for only a one week extension significantly prejudiced the rights of 800 number subscribers who were unable to obtain protection of the same number in the 888 SAC (the "888 equivalent number").

22-23 (¶¶ 37-38). As a result, some commercial 800 number subscribers were unable to obtain interim protection for their numbers because they were never notified by their RespOrgs. These companies have thus permanently lost the ability to protect their 888 equivalent numbers.

II. FACTUAL BACKGROUND

In an apparent response to concerns that the availability of the numbers in the existing 800 toll free access service were rapidly being depleted, the Commission adopted a Notice of Proposed Rulemaking ("*NPRM*") on October 4, 1995 in *The Matter of Toll Free Service Access Codes*, 10 FCC Rcd. 13692 (1995). The Commission stated that in light of this apparent situation, it believed it was necessary to "initiate a rulemaking proceeding through which we seek to assure that in the future, toll free numbers are *allocated on a fair, equitable and orderly basis*" (further emphasis added). *Id.* at 13692. As pertinent here, in general, the Commission sought comment on proposals to: (1) promote the *efficient* use of toll free numbers (emphasis added); (2) foster the fair and equitable reservation and distribution of toll free numbers; (3) smooth the transition period preceding introduction of a new toll free code; (4) guard against warehousing of toll free numbers; and (5) determine how toll free vanity numbers should be treated. *R&O*, slip op. at 3 (¶ 4). Interested parties were directed to file comments with the FCC on or before November 1, 1995 and reply comments on or before November 15, 1995. 10 FCC Rcd. at 13707.

The Commission, *inter alia*, requested comments on several proposals to protect the rights of existing commercial 800 number subscribers in their corresponding numbers in the proposed 888 SAC. *Id.* at 13699-70. Among these proposals was one that would partition allocation of toll free numbers into a particular SAC based on whether the subscriber was commercial or

residential. *Id.* at 13704. The Commission recognized the interest of commercial 800 number subscribers in "having invested substantial resources in advertising [a particular] number and in establishing the reputation for it." *Id.* at 13699 (wherein the Commission referenced 1-800-THE CARD and 1-800-FLOWERS as examples of numbers with significant investments).^{3/} Implicit in the Commission's statements was the recognition that commercial toll free service was worthy of special protection. In addition, the Commission noted that rapid depletion of 800 numbers appears to have been due in part to allocation of these numbers to those who may not be putting them to use. 10 FCC Rcd. at 13696, n.35.

An industry-based committee, the Service Management System/800 Number Administration Committee, known as "SNAC," submitted a proposal to the Commission to address the issue of affording 800 number subscribers the right to claim some type of protection in their 888 equivalent numbers, or "replication" of these numbers. In its "replication plan" (the "SNAC Plan"), SNAC informed the Commission that it had directed RespOrgs, who could reserve toll free numbers for their own use or their customers' use, to poll their respective 800 number subscribers to determine which subscribers wish to replicate in the 888 service. Once these numbers were identified, SNAC directed that DSMI, the database manager for the current 800 toll free service, mark such numbers as unavailable. Once the numbers were designated as unavailable, the numbers would not be released for reservation at the time the rest of the 888 code was available for reservation. *R&O*, slip op. at 15-16 (¶¶ 25-28).

^{3/} Those numbers were termed "vanity numbers." The *R&O*, in effect, defines "vanity number" to include all numbers assigned to commercial subscribers who request interim protection of their 888 equivalent numbers. *R&O* slip op. at 7-8 (¶¶ 12-14). Thus, all commercial subscribers' 800 numbers, including all of Petitioners' numbers, are vanity numbers and thus eligible for protection.

A. 888 Implementation

On January 25, 1996, the *R&O* was adopted. (Resolution of the instant proceeding had been delegated to the Bureau by the full Commission by *Order, Mimeo No. FCC 96-18*, adopted on January 24, 1996 and released January 25, 1996.) As pertinent herein, the *R&O* adopted the SNAC Plan, with a slight modification described below, but retained the March 1, 1996 deployment date for 888 toll free access service. *R&O*, slip op. at 2-3 (¶ 2) and 33-34 (¶ 58). The *R&O* contained no discussion of any alternative plan for implementing service in the 888 SAC. Nor did it discuss other relevant facts, which were brought to the Bureau's attention by Vanity International and others in comments.^{4/} These comments demonstrate that the interexchange carriers, which constitute most of the major RespOrgs, have been squandering 800 numbers for several years by offering them to non-business customers who may never have requested them. In fact, of the approximately eight million 800 numbers that are presently in use, well over half are used by residential or paging customers. See Declaration of Robert H. Tate, attached hereto as Exhibit 1, at ¶ _____. Because the FCC heretofore had not been involved in toll free number allocation issues, the "industry" had wasted potentially millions of numbers.

The *R&O*'s failure to raise the "squandering" issue is surprising because the *NPRM* touched on it. 10 FCC Rcd. at 13696 ("we are concerned by reports that some subscribers are having toll free numbers assigned to them without even requesting them and using them little, if at all"). But instead of doing the logical thing, which would be to investigate *first* whether existing toll free numbers were being used properly and efficiently, and *then* decide if additional toll free SACs were needed, the Bureau proceeded with 888 implementation anyway.

^{4/} See e.g., Comments of Vanity International, filed on November 1, 1995.

B. Replication

With respect to replication, the *R&O* did allude to the need to ensure protection of commercial 800 numbers, at least temporarily. It directed DSMI to "set aside those 888 numbers identified by the RespOrgs as a result of this polling process by placing these 'vanity numbers' in 'unavailable' status until the Commission resolves whether these numbers ultimately should be afforded any permanent special rights or protection." *R&O*, slip op. at 2-3 (¶ 2). Vanity numbers were defined by the *R&O* "to describe [any] number that a subscriber requests be made unavailable during the initial 888 reservation period." "A number designated "unavailable" in the SMS database is not available for assignment to any toll free subscriber." *Id.* at 2, n. 4, 5.

Prior to the adoption of the *R&O*, the Bureau was under the apparent assumption that all RespOrgs, as directed by SNAC, were actively engaged in polling their 800 number subscribers to determine if they wanted their 888 equivalent numbers protected.^{5/} One commenter, Vanity International, put the Commission directly on notice, that notwithstanding representations made to the Commission by SNAC and other commenters that the RespOrgs were polling their commercial subscribers as directed by SNAC, to permit SNAC to process the information and inform the Commission of its results, many RespOrgs were not, in fact, contacting or polling their commercial 800 subscribers, especially smaller commercial subscribers such as Petitioners.^{6/}

In response, instead of halting the proceeding to determine why RespOrgs were not notifying their subscribers of the replication option and demanding that notification be made

^{5/} See e.g., Comments of the Service Management System/800 Number Administration Committee of the Order and Billing Forum filed with the FCC on November 1, 1995 at 13-14, and the SNAC 888 Replication Plan filed with the FCC on December 13, 1995 at 1.

^{6/} *Ex Parte* Comments of Vanity International, filed January 19, 1996.

immediately, the Bureau directed that the polling process by RespOrgs of their previously unpolled commercial 800 number subscribers continue for another week, or until February 1, 1996. In particular, the Bureau modified the SNAC plan, allowing RespOrgs to continue the polling process for a period from January 26, 1996 until 11:59 p.m. on February 1, 1996, in order to contact commercial subscribers not previously polled. *R&O, slip op.* at 2 (¶ 2); 23 (¶ 38). Once the window period closed, from February 2, 1996 until February 9, 1996, DSMI was given time to process all replication requests in the database. On February 10, 1996, at 12:01 a.m., an early reservation process went into effect, permitting RespOrgs to reserve available 888 numbers listed in the DSMI database. Significantly, the Bureau did not order RespOrgs to notify their customers of the opportunity to request replication. At the same time, the Bureau nevertheless concluded that the 888 code should be opened irrespective of whether commercial 800 numbers were afforded interim protection. *Id.* at ¶ 14. The Bureau apparently assumed that *every* commercial 800 number subscriber who desired interim protection would have been polled by its RespOrg, and that *all* requests would be entered into the database within just one week after the release of the *R&O*^{7/}.

As demonstrated by the facts stated in Exhibit 1 and the comments referenced in footnote 4, *supra*, some 800 number commercial subscribers were never informed that they had the option of requesting interim protection for their 888 equivalent numbers. Most of these subscribers were thus totally unaware that, in order to ensure replication of these numbers, their RespOrgs were

^{7/} Because public notice of the *R&O* was not provided until February 29, 1996, many 800 number subscribers would not learn of the extension of the replication deadline until a month after the deadline passed.

required under the SNAC Plan to submit the requests for replication to DSMI by December 14, 1995.

Subsequently, the Bureau recognized that something was awry. Petitioner Genesis, together with Vanity International, filed an Emergency Petition for Special Relief on February 29, 1996 ("Emergency Petition") informing the Bureau that they were refused replication of their 800 numbers by their RespOrgs.^{8/} Other subscribers told the Bureau that while they had requested interim protection, their did not appear on any "unavailable" list. In response to these concerns, late in the evening on February 29, 1996 (just hours before implementation of the 888 SAC), the Bureau informed DSMI that, because "disputes have . . . arisen regarding whether certain 888 numbers should have been made 'unavailable,'" it was directing DSMI to reclassify as "unavailable" any 888 number subsequently identified no later than March 15, 1996 by an 800 number subscriber or its RespOrg "as long as that number is still not in 'working' status."

Letter from Regina M. Keeney, Chief, Common Carrier Bureau, FCC to Michael Wade, President, Database Service Management, Inc. dated February 29, 1996 (the "February 29 Letter").^{9/}

Thus, while the Bureau begrudgingly acknowledged that the system had not worked as intended, it only allowed a partial remedy. For the subscribers whose numbers that had been

^{8/} Petitioners Genesis and Vanity International also filed on February 29 an Emergency Motion for Stay of the March 1, 1996 implementation of the 800 SAC.

^{9/} Petitioner Genesis withdrew from both the Emergency Petition and the Emergency Motion for Stay. In light of Petitioner Genesis' withdrawal, the Bureau dismissed the Emergency Motion for Stay as moot in light of the actions ordered by the February 29 Letter. See FCC Mimeo No. DA 96-280, released March 1, 1996.

placed in "working" status after March 1, 1996 but before the replication request was given by a RespOrg to DSMI, there was no remedy at all.

Petitioner Genesis ultimately succeeded in placing 1-888-256-7766 (1-888-BLOSSOM) in the "unavailable" pool, but at significant cost and expense due to the fact that this number had been placed in "reserved" status on behalf of another party prior to February 29. Genesis immediately commenced its own investigation of the facts surrounding 888 deployment and discovered several troubling ones, which cast doubt on the notion that the 888 SAC is needed.

III. STANDARD FOR FILING PETITION

Under the FCC's rules, petitions for reconsideration must rely on facts which have been previously presented to the Commission, or else certain conditions must be met. 47 C.F.R. § 1.429(a). This petition meets the "previously presented facts" standard. In particular, arguments questioning the need to implement the 888 SAC were made by at least one commenter.^{10/} In response to the *NPRM*, this party also urged the Commission to consider alternatives that would segregate residential and paging customers into a separate SAC.^{11/} The Bureau failed to address any of these alternatives in the *R&O*. Moreover, in a subsequent filing, the same commenter also raised the concern that not all 800 number subscribers were aware of

^{10/} See Comments of Vanity International at 2 (wherein the commenter noted that the "crisis" results not from a shortage of 800 numbers but rather from frivolous assignments of these numbers by members of the toll free number industry).

^{11/} Comments of Vanity International at 4. See also Comments of Service Merchandise at 7; Comments of 800 Users Coalition at 8-13.

the need to request replication.^{12/} Thus, the facts supporting this petition have been previously presented to the Commission.^{13/}

IV. ARGUMENT

A. The Bureau Failed to Consider the Proposals Commenting on the Need For the 888 SAC, In Violation of Its Statutory Mandates

One of the cardinal tenets of administrative law is that an administrative agency must engage in reasoned decision-making. *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C.Cir. 1970). The Administrative Procedure Act ("APA") requires that an agency must consider all of "the relevant matter presented" by comments in a notice and comment rulemaking, 5 U.S.C. § 553(c) (1996). The agency "must articulate with some clarity the reasons for its decision and the significance of the facts related to it." *Central Florida Enterprises v. FCC*, 598 F.2d 37, 49 (D.C. Cir. 1978), *cert. dismissed*, 441 U.S. 957 (1979). This means that if it conducts a "notice and comment" rulemaking, the agency must not reach a decision without giving appropriate consideration to all submitted comments, and in explaining its decision it must state why alternatives to the result were rejected. There is no indication in the *R&O* that the Bureau considered comments filed by Vanity International and others addressing the need for the 888 SAC, or alternative means of addressing the perceived shortage of toll free numbers. Thus, the Bureau has violated the APA.

^{12/} *Ex Parte* Comments of Vanity International, filed January 19, 1996.

^{13/} Had Petitioners been aware of the imminent implementation of the 888 SAC, they would have vigorously protested the plan themselves. However, Petitioner Genesis, for example, did not become aware 888 implementation until December 1995 (*See* Exhibit 1 at ____).

In addition, an agency that reaches a decision based on assumptions that certain statements are accurate runs the risk of having its decision reversed on appeal as arbitrary and capricious. For example, in *Aeron Marine Shipping Co. v. United States*, 695 F.2d 567 (D.C. Cir. 1982), the court faulted a decision by the Maritime Supply Board when the Board failed to make appropriate inquiries about assumed facts before reaching its decision. *Id.* at 579-80. Like the Maritime Supply Board, the Bureau merely assumed that certain "facts" were accurate -- to wit, that there was a compelling need for an additional toll free number SAC -- without conducting a sufficient inquiry. Simply put, the Bureau have probed the need for the 888 SAC more deeply.

Moreover, it wasn't as if the Bureau had no knowledge of the reasons why the 800 SAC was exhausted prematurely. Indeed, in addition to the comments filed in this proceeding, the questions posed in Paragraph 13 of the *NPRM* reveal that the Bureau knew that some interexchange carriers were automatically assigning an 800 number with each calling plan offering. *See NPRM*, 10 FCC Rcd. at 13696, n. 35. The *NPRM* even asked for comment on whether such distribution serves the public interest. *Id.* Yet none of this was addressed in the *R&O*.

The evidence also demonstrates the extent to which 800 number service is implemented inefficiently. For example, many paging companies employ one 800 number per customer, thereby tying up hundreds of thousands of numbers, when Personal Identification Number ("PIN") technology is available to permit multiple customers to use the same number. Exhibit 1 at ¶ 7. A company known as SkyPage employs such technology with great success. Moreover, over 76 percent of residential customers subscribing to 800 numbers never use them. *Id.* Minimum usage

requirements would also address the residential non-use scenario, as would an assessment of a fee on RespOrgs for residential use. All of this was in the record for the Bureau to consider.

In addition, the *R&O* ignored other viable alternatives to 888 implementation that were proposed by the Commission and recommended by others. To wit, one commenter suggested that instead of continuing with the unstructured and ill-defined allocation of any toll free number on a first-come, first-served basis, the FCC should implement a "SAC by service" plan. *See* n. 9, *supra*. This would have moved residential and paging customers into their own SAC, and at the same time freed up millions of 800 numbers for commercial use. Petitioners suggest that the previously authorized "500" SAC, designated for use by Personal Communications Services, would be an ideal code to relocate residential and paging customers.

In addition to violating the Administrative Procedure Act, the *R&O* violates the Communications Act of 1934, as amended. Title II provides the Commission with the authority to regulate common carrier services, including toll free number service. *See* 47 U.S.C. §§ 201 *et seq.* As the Commission itself noted in this proceeding, "these statutory mandates compel the Commission to promote the efficient use of existing toll free numbers and to ensure that new toll free numbers are assigned and used in an efficient, fair, and orderly manner." 10 FCC Rcd. at 13696. Implementation of 888 under the *R&O* has been neither efficient, nor fair, nor orderly.

B. 888 Implementation Under the Bureau's Order Impairs Existing Toll Free Service

All of this is important because toll free number service in the 800 SAC is a critical component of many U.S. businesses. Companies employ 800 numbers in a variety of ways. Some, such as airline, hotel and car rental companies, use the number as a means for their customers to reserve their services. Others, such as banks and brokerage houses, provide the

opportunity for consumers to make financial transactions over the phone. Still others use the number to enhance customer relations through "customer complaint lines."

Companies such as 1-800-FLOWERS, 1-800 MATTRES and 1-800-BLOSSOM have developed businesses in which nearly every transaction is completed by using an 800 number.

To these companies, their 800 numbers are their most important business asset. They have invested significant sums of money in advertising and marketing so that consumers will notice and remember these numbers. They also have spent a great deal to protect proprietary rights in these numbers, including seeking federal trademark protection.

Prior to March 1, 1996, all commercial 800 number subscribers had established what Petitioners call a "brand identity" in 800 numbers in the minds of consumers. This identity extends beyond the mnemonic value of a given number; it covers 800 numbers as a class. The general public has come to understand the term "800 number" to be synonymous with "toll free service." The phrase "800 number" has thus acquired what can only be described as a secondary meaning.

Because of this, consumers did not need to think about a SAC when calling a toll free number, because there was only a single SAC. Instead, consumers focused on the valuable part of the number -- the last seven digits. By having those digits spell a memorable word or phrase (*e.g.*, American Express' "THE-CARD"), or by simply using easy-to-remember numbers (*e.g.*, Sheraton's 325-3535), companies created a special feature that registered in the consumer's memory.

As a result of the *R&O*, and the resultant implementation of the 888 SAC, this unique facet of 800 number service has been destroyed. Consumers will now have to become

accustomed to remembering not only the seven digit phrase or number, but also the specific SAC. Many will be hopelessly confused. Some will start to discount the value of 800 number service altogether, especially if they happen to call someone other than the company whom they intended to call.

If the FCC and the telephone industry had been confronted with a run on all 8 million 800 numbers by exclusively commercial enterprises, the detrimental effect of adding an additional toll free SAC perhaps could have been justified by the overriding benefits of greater competition created by new enterprises. But this is not what occurred. As Petitioners understand it, the primary reason why there had been a tripling of the weekly draw of numbers in early 1995, resulting in only 600,000 numbers remaining out of the eight million possible combinations, was that interexchange carriers were giving them away to consumers. Once one company did this, the others had to follow suit in order to be competitive. While this was not illegal under FCC laws, it certainly was contrary to the public interest in "efficient use" of telecommunications resources. 10 FCC Rcd. at 13696.

This scenario was exacerbated by the fact that the foxes were guarding the henhouse. The RespOrgs that complained that there were no more available numbers were also the interexchange carriers that were giving them away. These carriers participated on the committees that decided how to allocate numbers and whether to ask for a new toll free SAC. To be sure, the more numbers that are allocated for use, the greater number of total calls will be made. Thus, the carriers had every incentive to issue as many numbers to as many different users as possible.

The Bureau should not have bought into the argument made by the carriers that it was so critical to implement 888 service by March 1, 1996. This is especially disheartening given the

significant lessening of any need to have met the March 1 deadline in light of the Commission's conservation plan providing for the availability of 800 numbers to the public at least through June 1996. Had the Bureau acted back in January, or earlier, it easily could have ordered RespOrgs to reclaim unused or significantly underused 800 numbers from residential users, ordered the halt of allocating additional toll free numbers to residential users unless they specifically requested them, and placed all residential customers in the 500 SAC with no disruptions. This would have obviated the need for the 888 SAC. of course, the Commission can still take these measures, but in the interest of all it should move quickly.

Petitioners recognize that this proceeding has not been terminated, and thus some of the proposals made by the Commission may ultimately be adopted, including SAC by service (but apparently only for vanity numbers). What Petitioners object to is the decision to go forward with 888 implementation without resolving the issue of the need and practicality of implementing service in the 888 SAC.

In sum, Petitioners submit that, instead of going forward with 888 implementation, the Bureau should have ordered the industry to develop a plan that would have considered the needs of commercial subscribers in a discrete, commercially-oriented SAC while still allowing for unfettered initiation of toll free service for residential and paging customers.

C. The Bureau Wrongfully Accepted SNAC'S "Early Reservation" Plan

As discussed earlier, SNAC, a Committee composed of many of the same carriers who stood to benefit from acceleration of the implementation rate of new toll free SACs, proposed that reservations for 888 numbers be accepted and placed in "reservation" status starting on February 10, 1996. The Bureau accepted the SNAC plan, which resulted in the assignment of

many 888 numbers to new customers as of March 1, 1996. Many of these numbers were immediately placed in "working" status on that day or shortly thereafter. However, information garnered since the adoption of the *R&O* revealed that SNAC plan was fatally flawed in that many RespOrgs failed to notify their 800 number subscribers of the right to request interim protection for their 888 equivalent number. Other RespOrgs apparently chose to selectively inform preferred or larger customers of their replication rights, while ignoring other customers.^{14/} See Exhibit 1, Attachment A at _____. Still others provided misinformation about the effect of requesting replication when they were no doubt fully aware of the SNAC plan. And some RespOrgs failed to provide to DSMI certain 888 numbers for which interim protection had been requested. Thus, reservations were accepted as of February 10, 1996 for 888 numbers that, by any measure, rightfully should have been protected and placed in the "unavailable" pool.^{15/} The *R&O* thus had the unintended effect of cutting off the rights of those the Bureau was trying to protect.

The February 29 letter extended the opportunity to request interim protection for 888 numbers, except for those 888 numbers that were already placed in "working" status. Absent further FCC action, these numbers are now irretrievable. The only legal remedy available to the 800 number subscribers who lost their 888 equivalent number is to pursue a claim under the trademark laws, a costly proposition. This is a blatantly unfair and unjust result that should not be countenanced by the FCC. In fact, inaction by the Bureau to correct the adverse consequences

^{14/} See *Ex Parte* Comments of Vanity International, filed January 19, 1996.

^{15/} In addition, because there was never an affirmative order that RespOrgs notify their 800 number subscribers about the advent of the 888 database, there are undoubtedly some subscribers who still are unaware of their options. Petitioners propose that the Commission mandate notification by RespOrgs, and provide an additional six months of time to allow 800 number subscribers to request replication.

as a result of the unlawful activities of certain RespOrgs in connection with the implementation of the *R&O* can only be viewed as tacit approval of these activities by the Bureau, which indisputably is contrary to law. *See* Administrative Procedure Act, 5 U.S.C. § 706(1)(B).

Accordingly, even if the Bureau decides not to terminate 888 service altogether, it must reconsider the *R&O* to the extent that it addresses the protection problem.^{16/} To do otherwise would be to turn a blind eye towards black letter law in the Communications Act requiring all carriers to treat all customers on an equal footing. 47 U.S.C. § 202. It would also implicitly excuse the misconduct committed by the RespOrgs in not informing all 800 number subscribers of their right to request replication.^{17/}

V. RELIEF REQUESTED

Based on the foregoing, the only equitable course for the Bureau to take is to reconsider its order allowing for implementation of the 888 SAC. To this end, the Bureau must order DSMI to halt the assignment of additional numbers in this SAC; all new toll free numbers must be assigned from the 800 SAC. Further, the Bureau demand the reclamation of those numbers that are in "working status" for which replication was requested prior to March 15, 1996 but denied. The Bureau should require that non-replicated 888 commercial numbers be relocated to the 800 SAC by a date certain; at that point, the 888 SAC will be put on hold until its need is better justified. In the meantime, an order should be crafted that requires efficient allocation of toll free

^{16/} Technically, the Bureau has the authority to order relief for 800 number subscribers that lost their number independently of the *R&O*.

^{17/} The Commission clearly has authority to require that RespOrgs provide access to the SMS database under Title II of the Communications Act. *See In the Matter of Provision of Access for 800 Service*, 8 FCC Rcd. 1423, 1428 (1993) (wherein the Commission determined that such access by RespOrgs constitutes provision of common carrier services).

numbers by moving residential and paging customers subscribing to the 800 SAC to an existing underused SAC -- preferably the 500 SAC. (It can be assumed that residential and paging subscribers who genuinely desire toll free numbers should not care whether they are placed in a non-800 SAC.) These numbers can then be reassigned to commercial subscribers, for whom 800 service was always intended in the first place.

If the Bureau acts quickly, all of the above can be accomplished with minimal disruption. Comparatively few businesses have initiated 888 service so far, so there will not be the need to reclaim many numbers. Furthermore, there still are many numbers in the 800 SAC available for assignment to commercial subscribers. Finally, the Bureau must also freeze the allocation of new toll free numbers to residential and paging customers that did not request them.

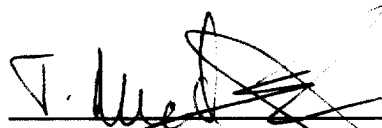
If the Bureau refuses to halt the implementation of the 888 SAC and the reassignment of numbers already assigned to that code, it still must instruct DSMI to reclaim those numbers for which replication protection should have been accepted. These numbers include all that should have been protected because replication requests were made prior to February 1, 1996, as well as those that were accepted between March 1 and March 15, 1996 pursuant to the February 29 letter. It was a mistake to allow for *bona fide* replication requests to be accepted without ensuring that they would be honored. Finally, the Bureau should reopen the window for requesting replication for an additional period of time.^{18/} Petitioners suggest six months. This should be a sufficient amount of time for all 800 number subscribers to request replication.

^{18/} To the extent that this remedy would be governed by the February 29 Letter, request is hereby made for reconsideration of the Bureau's actions described in that letter.

VI. CONCLUSION

Accordingly, for the foregoing reasons, Petitioners request that the Bureau reconsider the *R&O* as indicated above.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'T. Michael Jankowski', is written over a horizontal line.

T. MICHAEL JANKOWSKI
COLLIER, SHANNON, RILL & SCOTT
3050 K Street, N.W.
Suite 400
Washington, D.C. 20007
(202) 342-8400

Counsel to Genesis Two, Inc. and
Stop 888 Coalition

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